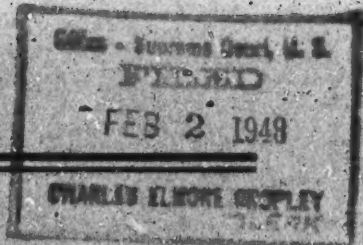


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 80

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM
CORPORATION, RKO RADIO PICTURES, INC., et al.,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

No. 79

THE UNITED STATES OF AMERICA,
Appellant,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM
DISTRIBUTING CORPORATION, LOEW'S
INCORPORATED, et al.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR
TWENTIETH CENTURY-FOX FILM CORPORATION
AND NATIONAL THEATRES CORPORATION**

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Theatres Corporation.*

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February 2, 1948.

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LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM
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Appellants,

No. 80

vs.

THE UNITED STATES OF AMERICA.

**BRIEF FOR
TWENTIETH CENTURY-FOX FILM CORPORATION
AND NATIONAL THEATRES CORPORATION**

This brief is submitted on behalf of the defendants, Twentieth Century-Fox Film Corporation and its wholly owned subsidiary, National Theatres Corporation, who appeal from Sections III (5), III (6), and V of a decree (R. 3699-3700) of a district court for the Southern District of New York, convened under the Expediting Act of February 11, 1903, entered December 31, 1946 (R. 3694-3701). These defendants are appellees in the plaintiff's appeal herein (No. 79), and in their brief on that appeal, which is bound herein, ask for affirmance of all the other provisions of the decree.

History of This Litigation

This action, under the Sherman Act, was begun July 20, 1938, against the then eight principal producers and distribu-

tors of motion pictures, five of whom operated theatres. The petition sought injunctions against various distribution and sales practices alleged to be maintained by contracts and conspiracies in restraint of trade, and to compel the five theatre-owning companies to divest themselves of their theatres.

An amended and supplemental complaint was filed on November 14, 1940 (R. 3137-3201). In this amended and supplemental complaint, the plaintiff criticized the lack of competitive bidding by competing exhibitors in the licensing of motion pictures (R. 3173, 3177, 3178). On November 20, 1940, by consent of the plaintiff and the five theatre-owning defendants, a decree was entered (R. 3373-3402). This consent decree, among other things, enjoined each distributor from offering a motion picture for license until after it had been completely produced and trade shown (Sec. III); prohibited each distributor from licensing its trade-shown pictures in groups of more than five at a time (Sec. IV); required each distributor to license its pictures to any exhibitor on some run (Sec. VI); specified standards for clearance (Sec. VIII), and enjoined each distributor from arbitrarily refusing to license a run (Sec. X). The plaintiff agreed that it would not, for a period of three years after the entry of the consent decree, either in this action or other proceeding, seek to compel the theatre-owning distributors to divest themselves of their theatres, or to dissolve or break up any circuit of theatres of such defendants (Sec. XXI, R. 3395). A comprehensive arbitration system for determination of controversies arising under the decree was established under the auspices of the American Arbitration Association (Sec. XXII, R. 3395-3400).

On August 7, 1944, the plaintiff filed an application for a radical modification of the decree (R. 3414-3419). It requested a decree enjoining any defendant from thereafter acquiring any

financial interest in any theatre, and requiring each defendant, within three years, to "completely divorce its exhibition business from its production and distribution business to the end that no defendant directly or indirectly engaged in producing or distributing films shall then own any financial interest in theatres" (R. 3418).

It sought to eliminate Section XVII of the consent decree, which affirmatively stated each distributor's right to license its pictures to exhibitors on such runs as it might negotiate.

The application for modification did not ask for the abolition of the arbitration system; rather, it provided not only for arbitration of clearance and the other disputes arbitrable under the consent decree but sought the inclusion of a new section, to replace old Sections IX and X, which the plaintiff suggested should read as follows:

"No distributor defendant shall license or make available for exhibition in theatres any films released by it upon terms which have the effect of unreasonably restraining competition between two or more theatres in exhibiting said films. Controversies arising on a complaint by an exhibitor thereby affected that a distributor has so licensed or made available such films for exhibition in the complainant's theatre or in a theatre competing with his theatre *shall be subject to arbitration* in accordance with the terms of this decree. If the arbitrator finds that this section has been so violated, he shall make an award which will describe the specific course of conduct found by him to violate this section and will require the payment of an amount by such defendant or defendants as he finds have engaged in such conduct which in his judgment will compensate the complainant for any pecuniary loss sustained as the result of such a violation or violations and discourage the recurrence of such violations" (R. 3417-3418). (All emphasis in this brief is supplied.)

On February 5, 1945, the plaintiff moved for the entry of an order enjoining the five theatre-operating companies "from granting unreasonable clearance in licensing for exhibition in theaters feature films distributed by them, pending the entry of a final decree herein" (R. 3420-3421).

A hearing on that application was had on March 5, 1945. Before the motion for injunction was determined, plaintiff filed its certificate for an expediting court (R. 3502-3503), which deprived the district judge of jurisdiction.

Hearings before the expediting court, consisting of Circuit Judge Augustus N. Hand and District Judges Henry W. Coddard and John Bright, began on October 8, 1945, and were concluded November 20, 1945. The plaintiff did not call any witnesses and relied wholly on what it called a "paper" case. Oral arguments were had in January, 1946 (R. 2545). The opinion herein was filed June 11, 1946 (R. 3504-3563). It is reported in 66 F. Supp. 323. Proposed findings of fact and conclusions of law were submitted by all parties and extensive hearings thereon were had in October, 1946 (R. 2814-3090). The findings of fact, conclusions of law and decree of the court were filed December 31, 1946 (R. 3659-3702). They are reported in 70 F. Supp. 53. Timely motions were made by the defendants to amend certain of the findings of fact, conclusions of law and provisions of the decree, and hearings were had thereon on January 22, 1947 (R. 3091-3135). An order was entered February 11, 1947, denying these motions in all substantial respects (R. 3719-3720).

These defendants filed their petition for appeal on February 26, 1947 (R. 3726-3727), with their assignments of error and prayers for reversal (R. 3727-3737). An order was that day entered allowing their appeal (R. 3737-3738). This Court noted probable jurisdiction by order dated June 23, 1947 (R. 3840).

Jurisdiction

The jurisdiction of this Court to review by direct appeal the decree herein is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15 U. S. C. Sec. 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. Sec. 345).

Statutes Involved

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. §§ 1, 2, 4):

"§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *

"§2. Monopolizing trade a misdemeanor; penalty

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * *

"§4. Jurisdiction of courts; duty of district attorneys; procedure

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; * * *

STATEMENT

Motion Picture Business

The motion picture business falls into three successive steps—production, distribution and exhibition.

The end result of production is a master negative representing the final photographic version or edition of the screen play. The motion picture which one sees in the theatre is projected from a positive print developed from this master negative.

At the time this proceeding was begun in 1938, there were, in addition to the eight defendants, numerous individuals and corporations engaged in producing motion pictures (R. 1263-1265, 1350-1352). The number of domestic producers has substantially increased during the succeeding decade (R. 1521-1552, 626-631) and many foreign-made pictures are being imported. The cost of producing pictures has increased substantially. Picture production is a highly speculative business. This is particularly so with respect to companies which produce many pictures each year as compared with producers who make only one or two specially selected productions.

A steady volume of quality feature productions is required for the successful operation of theatres. The ordinary American theatre, with its frequent program changes and double billings, requires approximately 208 to 312 feature productions annually.

There are thirteen nation-wide distributors of motion pictures engaged in licensing pictures to the 18,000 American theatres. All eight of the defendants are such distributors. In its own distributing business Twentieth Century-Fox, for instance, maintains branch offices—or exchanges, as they are known in the trade—in 31 of the principal cities of the United

States. In each exchange there are salesmen and sales supervisors, bookers, cashiers, billers and other clerks. Twentieth Century-Fox's exchanges are separate from those of every other distributor and it uses no facilities in common. It distributes both its own films and some pictures made by independent producers (R. 1053-1055).

In the licensing of films by the distributor to the individual theatre, certain business practices developed. Many of them are as old as the industry itself. In large part, they owe their origin to economic necessity. Illustrative of this development is the system of runs and clearances. In 1944 the average film rental received by Twentieth Century-Fox on its most successful picture, *Sweet Rosie O'Grady*, was \$201.89; yet the cost of a single positive print of that picture was \$344.29. Thousands of theatres paid less than \$50 film rental. And some theatres paid many times over the rental paid by the smaller theatres, as they must, if pictures are to be profitably produced.

This the court below recognized:

"The costs of each black and white print is from \$150 to \$300, and of a technicolor print is from \$600 to \$800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance." (R. 3531; cf. Finding 74, R. 3673)

Generally, a picture is first exhibited in the first-run theatres in the large cities; then in the first-run theatres in smaller communities; then in the neighborhood theatres in the larger cities and so on until the picture has been exhibited in 15,000 to 16,000 theatres in the United States.

Thus, when Twentieth Century-Fox licenses its picture "Captain from Castile" for exhibition in the Capitol theatre in Washington, no one else exhibits that picture in the Washington area during its performance at the Capitol, and for a limited number of days after the close of that engagement. That period of time which must elapse before the next showing of the picture, and which is usually specified in the contract, is called "clearance".

About the same time as "Captain from Castile" is exhibited for the first time or on first run in Washington, it is exhibited first run in Baltimore, Wilmington and Richmond. Exhibition in the more important smaller cities follows. Upon the expiration of a reasonable clearance period after the close of the first run showing in Washington, the picture comes to some of the neighborhood theatres and for many weeks thereafter is shown in different theatres throughout the city. For a period of two or three months, it can be seen at some theatre in Washington.

As a result of this method of licensing pictures, each theatre in the United States has a constant flow of pictures to it and every person has an opportunity to see every picture at an admission price he can afford to pay.

The exclusivity in the motion picture business is only temporary. The print, including all the sound effects, used at the Roxy theatre in New York and the Capitol in Washington, is exactly the same as the print used by a small theatre charging 15¢, some months later.

The necessity for runs and clearances is acknowledged by theatre operators. Usually a distributor licenses its pictures to a particular first-run exhibitor in an area. If this relationship proves to be satisfactory, it often continues from year to year (Thalheimer, R. 1379).

Of the 18,000 motion picture theatres in America, the five producer-distributors, Loew's, RKO, Paramount, Warner Bros. and Twentieth Century-Fox own or have an interest in only 3,137 (Finding 118, R. 3684). These theatres were acquired by the producers to prevent the boycotting of their productions, to provide regional "show cases" for the better advertisement of their productions, and to stimulate development of the industry.

From 1935 to 1945, 4,690 new theatres were opened (Finding 145, R. 3689). During that period Twentieth Century-Fox, for illustration, increased its total but 25 theatres. Thus, while the number of theatres greatly increased during the decade, Twentieth Century-Fox added an insignificant number.

Twentieth Century-Fox Film Corporation

Twentieth Century-Fox Film Corporation is a New York corporation organized in 1915. It produces motion pictures of high quality and distributes them, and some produced by others, in the United States and throughout the rest of the world, except where prohibited or restricted by foreign governments. The number of pictures which it has distributed during the ten motion picture seasons preceding the hearings varied each season and ranged from 61 in the 1936-1937 season to 25 in the 1944-1945 season (Ex. F-5).

These pictures are approximately 9% in number of those produced in the United States, and a somewhat lesser percentage of those distributed here (Finding 103, R. 3678; Exs. 40, 50, 80, 93, 125, 137, 362).

Twentieth Century-Fox is owned by the public. No other motion picture company has any interest in it. None of its officers or directors is an officer or director of any other motion

picture company. No officer or director of any other company is an officer or director of Twentieth Century-Fox (R. 216, 1253). Its pictures are produced in its own studio in Los Angeles, California, and distributed in this country from its 31 branches or exchanges located in the principal centers of population (R. 1053). It serves its more successful pictures to some 15,000 theatres in the United States, which is approximately the maximum number it could serve (R. 1072). Of the total film rental bill paid by all theatres in the United States, the part which Twentieth Century-Fox receives does not exceed 15% or 16%.

By far the largest source of its income is from film rentals paid by theatres which are unaffiliated with any producer or distributor. In 1944, such theatres paid to it 60.8% of its domestic revenue (Exs. F-18, F-27). Its own theatres account for 14.1%; the Loew's theatres, for 1.26%; the RKO theatres, for 5.52%; the Warner theatres, for 4.82%; and the theatres in which Paramount has an interest, for 13.46% (Finding 144, R. 3688; Exs. F-18, F-27).

Roxy Theatre, Inc.

Since 1937, Twentieth Century-Fox has owned all of the common stock of Roxy Theatre, Inc., which owns the Roxy theatre and the leasehold upon which it is erected at 50th Street and 7th Avenue in New York. This is one of the outstanding theatres in America and is used as a show case for Twentieth Century-Fox product. It is also a profitable investment. For some years, no pictures except those released by Twentieth Century-Fox have been exhibited therein (R. 1120-1121). It pays large film rentals (Exs. F-12, F-21). For statistical convenience it is treated as a theatre of National. Twentieth Cen-

tury-Fox has no interest in any other theatre except through its ownership of National Theatres Corporation.

National Theatres Corporation

Twentieth Century-Fox owns all the capital stock of National Theatres Corporation. National has five principal subsidiaries which own, lease and operate motion picture theatres in various parts of the United States, mostly in the western states (R. 2100-2101). The stock of National, formerly known as Wesco Corporation, was originally held by the public and was acquired by Twentieth Century-Fox in 1928 (R. 2104).

In 1933, the principal subsidiaries of National became bankrupt and their affairs were administered by trustees (R. 2105). In 1935, reorganizations of these subsidiaries were completed. The ultimate result was that The Chase National Bank of the City of New York, which had been the largest creditor of National, became the controlling stockholder, owning 58% of the stock, and Twentieth Century-Fox, 42%. For eight years, the Chase National Bank continued to be the majority stockholder until, in 1943, Chase sold its stock to Twentieth Century-Fox for \$13,000,000 (R. 1253).

Each of the five principal subsidiaries of National operates in a different part of the country and is separately managed by its own board of directors and officers (R. 2100). Fox Midwest has its home office in Kansas City; Fox Wisconsin in Milwaukee; Fox Inter-Mountain in Denver; Evergreen State Amusement in Seattle, and Fox West Coast Theatres in Los Angeles. Theatre policies, admission prices and methods of operation are determined upon and conducted separately by the management of each. Each of the five subsidiaries has its

own film licensing department and the respective officers of the companies have complete authority to enter into all contracts relating to the operation of the theatres and particularly film license agreements (R. 2009, 2015, 2052, 2100, 2107).

Acquisition of Theatres

Fox Film Corporation was organized in 1915 by William Fox, then already engaged in producing motion pictures and owning a few theatres and a booking agency.

In 1926, Fox Film Corporation acquired an interest in theatres on the West Coast by buying a one-third stock interest in West Coast Theatres, Inc.

The remaining two-thirds stock interest in that corporation was shortly thereafter acquired by Hayden, Stone & Co., bankers, who organized National Theatres Corporation (then known as Wesco Corporation) and sold its stock to the public. In 1928, Fox Film Corporation acquired the stock of National by issuing its own stock therefor and thus became the holder of all the stock of West Coast Theatres, Inc., the name of which it changed to Fox West Coast Theatres (R. 2104).

At that time Fox West Coast Theatres had a number of less than wholly owned subsidiaries and was associated with various individuals in the ownership and operation of motion picture theatres in different localities. These partial interests it has continued to hold. The other stockholders or "joint owners" were various: some were theatre operators who had formerly sold a part of their interest; some were heirs of former theatre operators; and some were simply members of the general investing public. Thus, a number of the partially owned theatre interests of National as they stand today came into existence prior to the time when Twentieth Century-Fox or National had any interest whatsoever in the theatres involved.

At the time of trial, National had an interest in 636 theatres out of a total of 18,076 in the country (Finding 118, R. 3684). It had one in Philadelphia and one in Detroit. It had first run theatres in Kansas City, Missouri, and in Kansas City, Kansas, in Wichita, Kansas, in San Diego, Oakland, Sacramento, San Francisco, Long Beach and Los Angeles, California, in Denver, in Spokane, in Seattle, in Portland, Oregon, and in Milwaukee. In none of the other 75 of the 92 cities in the United States having a population of 100,000 or more, did Twentieth Century-Fox or National have any theatre, first run or otherwise. In all of the 17 larger cities in which they had first-run theatres, they had first-run competition except in Wichita, Kansas.

There are 320 cities in the United States which have a population of between 25,000 and 100,000. In only 38 of them has National any theatres, and, as to these 38, it should be said that 7 of them are, in fact, part of metropolitan Los Angeles.

There are 1,630 towns in the country which have a population of between 5,000 and 25,000. National has theatre interests in only 102. These theatres of National are about one-half of one per cent. of the total number of theatres in the country. They were either acquired in 1928 as a part of National, as it was then constituted, or are theatres built or leased better to serve the communities in which National was then operating, or are theatres in communities adjacent to those in which National did have theatres (Finding 42, R. 3667).

Summary of Position in Industry

To sum it up: Twentieth Century-Fox produces about 9% of the feature motion pictures produced in this country and distributes a somewhat lesser percentage. As a distributor it

receives between 15% or 16% of the film rental paid by all theatres in the United States. Sixty percent of its revenue comes from unaffiliated, independent, exhibitors. It has an interest in only 636 theatres out of a total of 18,076. It has first run theatres in only 17 out of the 92 largest cities in the United States and has first run competition in every one of those cities except Wichita, Kansas.

National's Use of Other Distributors' Pictures

Twentieth Century-Fox does not make enough pictures to operate its own theatres exclusively with its own pictures. Nor does the revenue it receives from exhibiting its own pictures in its theatres begin to meet production costs.

As the court below found, except for a very limited number of theatres in the very largest cities, the 18,000 theatres in the United States exhibit the product of more than one distributor, and those theatres could not be operated on the product of only one distributor (Finding 151, R. 3689). This, indeed, is obvious. While the very largest theatres in the very largest cities may exhibit one picture on a single feature policy for several weeks, the ordinary theatre operates on a double feature policy, changes its program two or three times a week, and uses 208 to 312 pictures a year. A theatre, regardless of who its owner is, which changes its program two or three times a week and "double-features", uses substantially all of the quality motion pictures produced in this country.

National therefore licenses pictures distributed by the seven other distributor defendants and by other distributors, not defendants, both for exhibition in its first-run theatres in the larger cities and in its other theatres. Thus, in Kansas City, Missouri, it presently requires only the pictures of one other

- distributor, first run, to supplement its own, but in its neighborhood houses it uses pictures of all distributors. In Denver, it uses the product of several other companies first run, and in its neighborhood houses it uses pictures of all distributors.

What is true of National is true, in general, of the theatres of the other four theatre-owning defendants. Each supplements its program by exhibiting pictures of the other producers. Twentieth Century-Fox licenses its pictures for exhibition in some, but by no means all, of the theatres of the other four theatre-owning defendants.

There is, however, no condition imposed by National that when it licenses, for example, Warner pictures for exhibition in some of its theatres, Warner theatres shall license Twentieth Century-Fox pictures for exhibition in Warner theatres. The same is equally true as to Loew's, RKO and Paramount (R. 2107).

Nor is there any pattern of combination, conspiracy or restraint of competition discernible from the use of the pictures of other companies, as is shown below.

Loew's

In the 92 cities of more than 100,000 population, National exhibits Loew's pictures first run in 11. It does not license Loew's pictures in Portland, Oregon, Philadelphia or Detroit, although Loew's does not have theatres in those cities. National is in direct competition with Loew's first run in New York, Kansas City, Missouri, and Denver.

Loew's has first-run theatres in 36 of the cities. It uses Twentieth Century-Fox pictures, first run, in only 9 of them.

RKO

In those 92 cities, National exhibits RKO pictures first run in 8. It does not license RKO pictures in Long Beach,

Philadelphia, Milwaukee or Detroit, although RKO does not have theatres in those cities. National is in direct competition with RKO first run in New York, Kansas City, Missouri, Denver, San Francisco and Los Angeles.

On the other hand, RKO has first-run theatres in 18 of these cities. Yet RKO theatres license most of Twentieth Century-Fox pictures first run only in 5 and some of them in 4 of these cities.

Paramount

In those 92 cities, National exhibits Paramount pictures first run in 10. It does not license Paramount pictures first run in Philadelphia, Denver or Kansas City, Kansas, although Paramount does not have any interest in theatres in those cities. National is in direct competition with Paramount first run in New York, Detroit, Kansas City, Missouri, and Los Angeles.

On the other hand, Paramount has an interest in theatres in 47 of these cities. Yet its subsidiaries license Twentieth Century-Fox pictures in only 22.

Warner

In those 92 cities, National exhibits most of Warner pictures first run in 6. It exhibits part of Warner pictures in 4: Long Beach, Oakland, San Diego and Sacramento. A non-affiliated exhibitor in those four cities is licensed the other Warner pictures. National does not license Warner pictures first run in Detroit, Kansas City, Kansas, or Kansas City, Missouri, although Warner does not operate theatres in those cities. National is in direct competition with Warner in New York, Los Angeles, Milwaukee and Philadelphia.

On the other hand, although Warner has theatres in 28 of the cities, it licenses Twentieth Century-Fox product in only 5, and, in two of these 5, only a part of the product.

Summary

National exhibits:

Loew's pictures in 11 of the 92 cities

RKO pictures in 8 of the 92 cities

Paramount pictures in 10 of the 92 cities

Warner pictures in 6 and a part in 4 of the 92 cities.

Twentieth Century-Fox licenses:

Loew's to exhibit its pictures in 9 of the 92 cities

RKO to exhibit its pictures in 5 and a part in 5 of the 92 cities

Paramount's subsidiaries to exhibit its pictures in 22 of the 92 cities.

Warner to exhibit its pictures in 3 and a part in 2 of the 92 cities.

Film Payments Received by Twentieth Century-Fox and Paid by National

A comparison of the film payments made to Twentieth Century-Fox by the four other theatre-owning defendants and the payments made by theatres of National to the four other theatre-owning defendants, likewise negatives the existence of any combination or conspiracy. It shows that there is not the slightest relationship between the payments made to Twentieth Century-Fox by the theatres of any other distributor and the payments made to any other distributor by the theatres operated by National.

Thus, during the last twelve years, the revenue which Twentieth Century-Fox has received from the Loew's theatres has never exceeded 2.1% of its domestic total; currently, it is somewhat less (Exs. F-18, F-27). During the same period, the revenue which it has received from the RKO theatres has never exceeded 5.74% of its domestic total; currently, it is 5.52% (Exs. F-18, F-27). The revenue which it has received from the Warner theatres has never exceeded 5.35% of its domestic total; it has been as low as 1.98%; currently, it is 4.82% (Exs. F-18, F-27).

Twentieth Century-Fox also licenses its pictures to some of the theatres operated by the many separate operating groups in which Paramount has an interest. During the last twelve years, the revenue received by Twentieth Century-Fox from those theatres in the aggregate has never exceeded 14.23% of its domestic total. It has been as low as 8.70%; currently, it is 13.46% (Exs. F-18, F-27).

Contrast this with National's payments during the last ten years. It has paid Twentieth Century-Fox from 16.72% to 27.47% of National's annual film bill; in 1944-1945 it was 20.01%. It has paid Loew's from 21.14% to 34.75%; in 1944-1945 it was 23.51%. It has paid Paramount from 12.71% to 18.19%; in 1944-1945 it was 15.61%. It has paid Warners from 8.87% to 12.47%; in 1944-1945 it was 9.62%. It has paid RKO from 7.04% to 10.24%; in 1944-1945 it was 9.52% (Ex. F-18, F-23).

In the 1943-1944 film releasing season (the test year generally used at the hearings) the same disparity of payments and receipts existed as is shown by the following table which has been compiled from defendants' answers to plaintiff's interrogatories.

**Twentieth Century-Fox received
from the theatres of**

Loew's	2.1% of its domestic film rental which was 6.6% of the Loew's theatres total film bill
RKO	5.2% of its domestic film rental which was 17.0% of the RKO theatres total film bill
Warner	4.6% of its domestic film rental which was 10.1% of the Warner theatres total film bill
Paramount	12.7% of its domestic film rental which was 14.6% of the Paramount theatres total film bill
National	10.6% of its domestic film rental which was 20.0% of the National theatres total film bill
Independents	60.1% of its domestic film rental
	<hr/> 100.%

**National Theatres paid the following
percentages of its total film bill to**

Loew's	23.5% which was 9.5% of Loew's domestic film rental
RKO	9.5% which was 7.6% of RKO's domestic film rental
Warner	9.6% which was 7.8% of Warner's domestic film rental
Paramount	15.6% which was 8.4% of Paramount's domestic film rental
Twentieth Century-Fox	20.0% which was 10.6% of Twentieth Century-Fox's domestic film rental
Other distributors	21.8%
	<hr/> 100. %

The utter lack of relationship during the last decade between payment and receipt for films wholly refutes any claim that the theatre interests of the defendants have been used to control the distribution of their pictures.

Moreover, during this period there have been significant increases in both the dollar volume and the percentage of the whole which National has paid to the non-theatre-owning dis-

tributors. Thus, in 1935, National paid to Columbia 2.60% of its total film rental, and in 1944, 4.59%. In 1935 it paid to Universal 2.99% of its film rental; in 1944, 8.11%. In 1936 it paid to Republic .98% of its total film rental; in 1944, 2.27%.

Opinion, Findings, and Decree

The court below held that there was no monopoly or restraint of competition in the production of motion pictures (Findings 59, 60, R. 3670, 3695). The plaintiff, moreover, conceded that at the exhibition level each picture was in competition with every other picture for public patronage (R. 1062).

"Mr. Wright: In so far as pictures themselves are concerned, I suppose every picture that plays, whether it plays in theatres owned by the same exhibitor or in others, it is in competition for public patronage with every other picture, and that each distributor wants to get the most that he possibly can out of every picture that is exhibited, wherever it is exhibited. I do not think there can be any question about that." (R. 1062)

Thus, at the beginning of the process—the production of a picture—and at the other end—the seeking of public patronage—there was found to be competition and no violation of the anti-trust laws.

The court held, however, that in the distribution of pictures the defendants by concert had maintained admission prices, uniform clearances and fixed runs. These it held to be violations of the anti-trust laws. Refusing to follow *Federal Trade Com'n v. Paramount Famous-Lasky Corp.*, 57 F. 2d 152, it assumed that the simultaneous sale of two or more pictures

was the conditioning of the license of one motion picture on the licensing of another, and illegal.

The conspiracy or concert of action which the court below found with respect to distribution practices as to runs, clearances and admission prices was based entirely upon inferences from similarity of action. What was found and condemned was a rigidity in the selection of customers, the licensing of runs, the granting of clearances and the specification of admission prices. These similar trade practices grew out of competition rather than out of restraints of competition and, in fact, were encouraged by governmental agencies such as the Federal Trade Commission in 1927 and the NRA in 1933-1935.

The principal executives of the defendants testified and categorically denied conscious conspiracy or combination. There was no countervailing testimony by the plaintiff and it is submitted that the testimony of these responsible officials that the offenses found did not originate in actual agreements or conscious conspiracies should have been accepted. *Penna. R. Co. v. Chamberlain*, 288 U. S. 333.

The court below held that there was no illegality in the ownership of theatres by a distributor, that the defendants neither individually nor collectively had any monopoly of theatres or of the business of exhibiting motion pictures, and that the illegalities and restraints found were not in the ownership of many or most of the best theatres by the producer-distributors but in admission price-fixing and non-competitive granting of runs and clearances (Finding 154, R. 3690). The statutory court concluded that total divestiture of theatres would not remedy the distribution and sales practices found unreasonably to restrict competition and would be damaging to the public (Findings 155, 156, R. 3690).

The controlling findings are as follows (R. 3689-3690):

"152. There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution, or exhibition of motion pictures, except as found in findings 153 and 154 below.

"153. In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants.

"154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors; but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited.

"155. Total divestiture would be injurious to the corporations concerned and would be damaging to the public.

"156. Total divestiture would not remedy the price fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agree-

ments and the other practices which have been found unreasonably to restrict competition."

The decree is in two principal parts. The first, Section II, deals with distribution practices. Each distributor is enjoined

1) from fixing the minimum admission price which the exhibitor charges the public (Decree II (1), R. 3695);

2) from granting clearances fixed by agrément with other distributors, or between theatres not in substantial competition, or in excess of that necessary to protect the licensee in the run granted (Decree II (2), (3), (4), R. 3695-3696);

3) from performing or making any franchise, formula deals or master agreements (Decree II (5), (6), R. 3696);

4) from conditioning the licensing of one picture on the exhibitors' licensing another (Decree II (7), R. 3696);

5) from licensing any feature as between competing exhibitors who desire to show it on the same run except on a competitive basis under which license is granted to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor (Decree II (8), R. 3696-3698); and

6) from arbitrarily refusing to license one exhibitor a picture on the run desired, and then licensing that same picture on the same run to his competitor (Decree II (9), R. 3698).

The second, Section III, deals with exhibition. National, and each theatre-owning company, is required to terminate existing pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit

or whereby profits of "pooled" theatres are divided among the owners according to pre-arranged percentages (Decree III (2), R. 3698). In fact, National, although not conceding the validity of this requirement, has terminated all such arrangements and has so reported to the district court in accordance with the decree (III, (5), R. 3699-3700). It has also terminated its arrangement with Paramount in San Francisco and Paramount is now operating its own theatres in that city exhibiting therein its own and other distributors' pictures in competition with National.

Twentieth Century-Fox and National are enjoined from owning in conjunction with another (who is a former, present or putative motion picture theatre operator), any interest in a theatre unless its interest is 95% or more. Where National has a lesser interest, it must either divest itself thereof or acquire from its co-owner an additional interest so as to increase its interest to 95% or more. But National is permitted to acquire such an additional interest only if it secures the approval of the court upon a showing that such acquisition will not unduly restrain competition in the exhibition of motion pictures (Decree III (5), R. 3699-3700).

National is enjoined from expanding its present theatre holdings (Decree III (6), R. 3700):

The consent decree was terminated, and with respect to the arbitration system the decree provided (Decree V, R. 3700):

"But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves."

The court retained jurisdiction for the purposes of enabling any of the parties to the judgment, and no others, to apply

for such orders or direction as may be necessary or appropriate for the construction, modification or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof (Decree VIII, R. 3701).

QUESTIONS PRESENTED

Points to Be Argued

On this appeal, Twentieth Century-Fox and National Theatres argue only their assignments of error Nos. 25, 26, 27, 29, 30, 31, 33, 34, 35 and 39. The other assignments, however, are not abandoned in so far as they bear upon these defendants' arguments as appellees. Stated generally, these two defendants are not urging on this appeal any error in connection with Section II of the decree which enjoins various distribution and sales practices and which sets up a new method of distributing motion pictures on a bidding or competitive negotiation basis. They do urge that two paragraphs of Section III of the decree, namely, paragraph 5, dealing with holdings in less than wholly-owned subsidiaries, and paragraph 6, prohibiting the expansion of theatre holdings, be deleted. They also submit that the arbitration system created pursuant to the consent decree be retained, with appropriate modifications to deal with the problems which will arise under the decree.

ARGUMENT AS APPELLANTS

FIRST: THE DECREE SHOULD BE MODIFIED BY DELETING THOSE PROVISIONS OF PARAGRAPH 5 OF SECTION III WHICH PROHIBIT THE CONTINUED OWNERSHIP BY NATIONAL OF PARTIAL INTERESTS IN THEATRES IN CONJUNCTION WITH NON-DEFENDANTS.

After a painstaking review of the voluminous record in this case, the court below found:

- (1) that the acquisition of theatres by Twentieth Century-Fox was legal and did not violate the anti-trust laws (R. 354; cf. R. 1945);
- (2) that by such theatre holdings Twentieth Century-Fox does not and cannot individually or collectively with other defendants, have a monopoly of exhibition (Finding 119, R. 3684; cf. R. 3553);
- (3) that the ownership of such theatres did not create or cause the illegal restraints of trade found by the court (Finding 154, R. 3690; cf. R. 3554-3555);
- (4) that the illegal restraints found by the court involved primarily certain distribution practices, common to all distributors and applied to all exhibitors, restraints which could be effectively eliminated by the ordinary injunctive processes without resort to the harsh and extreme remedy of divestiture (Finding 156, R. 3690);
- (5) that divestiture would be injurious to Twentieth Century-Fox and damaging to the public (Finding 155, R. 3690).

In spite of these categorical conclusions, abundantly justified by the record, the court below proceeded to decree that where National owns less than all of a theatre, it must acquire from the other owner or stockholder an interest sufficient to bring its holdings to 95%, or dispose of its partial interest in the theatre. In so far as these provisions of the decree apply to theatres in which the other owner or stockholder is a non-defendant, we contend that they are unsupportable and should be deleted.

Apart from the propriety of such requirement, it must be obvious that it places National in a most inequitable position. As the other owner or stockholder cannot be compelled to

sell, National may have no alternative but to divest itself of its partial interest if he should refuse to sell at a reasonable price.

This ruling came as a surprise to all the parties. The plaintiff, in its pleadings, did not claim that any illegality resulted from relationships between a single defendant—such as National—and an independent. The plaintiff did not, during the hearings, tender any issue with respect to that subject. It introduced no evidence except as to the fact that each of the defendants had some wholly-owned subsidiaries and some partially owned. The exhibits referred to in the court's opinion (R. 3548) were introduced to prove relationships between one defendant and another defendant or an alleged affiliate of such other defendant. The plaintiff's claim of illegality was in the joint ownership of theatres by defendants. None of those exhibits was offered to establish any basic illegality in the joint ownership of theatres by a defendant and another person not a defendant. Nor does any of them furnish any support for the court's decision in this respect. Moreover, no evidence was introduced concerning the manner of acquisition, the intent or purpose of the acquisition, or the present effect upon competitive conditions of such partially-owned interests.

The inadequacy of the record to support the court's decision on this point is strikingly illustrated when applied to National. There are approximately 50 situations in which National and a non-defendant are interested in theatres, either through the ownership of stock in corporations or the ownership of a direct interest in the theatres themselves (Exs. 21-24). Some of these situations involve only one theatre. Others involve a substantial number of theatres. Yet there is evidence in this case with respect to only 2 of these 50 situations. And, with respect to these 2, the evidence simply consists of the documents and agreements reflecting the joint interest (Exs. 238,

239). Furthermore, as stated above, even this documentary evidence was introduced by the plaintiff solely for the purpose of establishing that the relationship between National and the other parties thereto was a relation between National and another defendant—a factual point contested by the defendants and not determined by the court.

Nor was it urged by the plaintiff in argument, or otherwise, that illegality existed in the ownership of less than all of an interest in a theatre. Because of this, and because the court had indicated that it was not concerned with the origin or development of these relationships. (R. 105), no evidence was offered by National as to these situations. We therefore think it fair to state that the record is barren of any evidence to justify the judgment of the court below on this issue.

We think that the court below reached its decision concerning these partially owned theatres by resorting to an unjustifiable analogy. The court had determined that the pooling of competing theatres by a defendant and another was an improper restraint of competition. It then apparently concluded that in every other instance in which some other person was interested in a theatre with a defendant the relationship was tantamount to a pool. Because of this assumption it made Finding 116 and included in the decree the blanket condemnation of these joint ownerships.

We contend the court erred in the assumptions which it made and in the conclusions which it drew from them. In Finding 116, the court said (R. 3683):

"116. When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other

joint owner, who otherwise would be in a position to operate theatres independently."

It is perfectly true that the other owners of the stock in corporations in which National has an interest wish to participate in the business of exhibiting motion pictures in the sense that they wish to participate in the profits of the enterprise. But it does not at all follow that such persons would have entered the motion picture business on their own, or would have built or operated theatres in competition with National. The record does not disclose whether these other stockholders are exhibitors, putative or otherwise. There is nothing to show that in fact their original investment with National was a restraint of competition or that but for the investment with National they would have operated competing theatres.

We therefore submit that it is not a *per se* violation of the anti-trust laws for National to own less than all the stock of a subsidiary which owns or operates a theatre. We further submit that to determine illegality in such a case there must be established: monopoly, the improper union of theretofore competing theatres, or the illegal operation of the theatres in some manner which restrains trade.

Furthermore, from what little evidence there is in the record on the subject, it appears that there is substantial competition in the communities where some of these partially owned theatres are located. For example, the competitive conditions in Los Angeles, where a number of National's less than wholly owned subsidiaries are located, are described in the record at pages 2125-2130. If there is already competition, this Court in *United States v. National Lead Co.*, 332 U. S. 319, made it clear that divestiture will not be authorized just to secure an additional competitor.

The principal restraints of trade found by the court, and the only restraints with respect to which direct evidence was introduced by the plaintiff, can all be effectively prevented by injunction. Where this is so, this Court has made it plain, in the *National Lead* case that the extreme remedy of divestiture will not be granted. In that case, the Government sought divestiture of property lawfully acquired—a situation quite analogous on the record in the present case. The restraints charged consisted of agreements between competitors which restricted the trade in the product manufactured in the plant, divestiture of which was prayed. With those restrictive agreements enjoined, the ownership of the physical plants was held legal and divestiture unnecessary. In summing up its conclusions, this Court said (332 U. S. 319, 353):

“It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion.”

We think the above language is particularly appropriate here. We emphasize that the record contains no evidence whatsoever with respect to the great majority of these jointly held theatre interests. Nothing is shown as to their origin, their purpose or their effect. There is nothing upon which this Court could predicate a determination that it was necessary to realign these existing operating units. There is no evidence that effective and lawful competition does not exist in the communities where these theatres are located.

The court below has indicated that all objectionable restraints in distribution can be effectively prevented by injunction. It found no monopoly in exhibition. There is no evidence that the great majority of the theatre interests affected represent improper joinder of theretofore competing units. Consequently divestiture is not an appropriate remedy here.

While not receding from the position taken above, we submit that at least the provisions of paragraph 5 of Section III of the decree should be modified to permit the retention by National of its less than wholly owned subsidiaries where it can show to the court that its retention would not unlawfully restrain competition. The option granted by the decree that National may "buy or sell" outstanding partial interests is somewhat illusory, as the court did not undertake, as it could not have undertaken, to compel the other stockholder to "buy or sell." It must be apparent that in many instances it may be impossible for National to buy and that a retention of its partial interest,—where that interest represents no unreasonable restraint of competition,—is the only just solution.

SECOND: THE DECREE SHOULD BE MODIFIED BY DELETING PARAGRAPH 6 OF SECTION III, WHICH ENJOINS THE DEFENDANTS FROM EXPANDING THEIR PRESENT THEATRE HOLDINGS.

We respectfully submit that the court below erred in incorporating in the decree the provisions contained in paragraph 6 of Section III which enjoin the defendants from expanding their present theatre holdings. Nothing in the record, in the opinion or in the findings of fact furnishes any basis for the inclusion of this injunction.

As stated, the court has found that it is legal for Twentieth Century-Fox and National to own and operate theatres (R.

3554). It has found that Twentieth Century-Fox and National have no monopoly in the exhibition field either nationally or in particular localities. It has found that there is no evidence indicating that anything done by these defendants constitutes an attempt to monopolize exhibition.

The illegality which the court found in the ownership of partial interests in conjunction with another was not in the number of such interests or because they constituted monopolization but rather that they were restraints of competition.

The court has found that in 1945, Twentieth Century-Fox and National had an interest in only 636 theatres, or about 3.52% of the then 18,076 motion picture theatres in the United States (Finding 118, R. 3684). The court did not criticize or find anything illegal in any of the activities of these defendants in acquiring those theatres. Nor did it intimate that the position of these defendants was so substantial in the exhibition field that its enlargement might bring about unlawful restraints. Moreover, it has not found, nor would there be any support in the record for a finding, that Twentieth Century-Fox or National has indicated any intention or desire to expand in any substantial way.

We submit that the only justification for the injunction against expansion of theatre interests would be that the acquisition of additional theatres would result in monopolization or restraint of trade. Yet the court, in its opinion, expressly stated that this was not the case. It said that there was no basis for injunctions against these defendants as exhibitors by reason of any monopolistic practices in the exhibition field (R. 3553):

"The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. *They can only be restrained from the*

unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized."

Indeed, the court, in its opinion, in outlining the decree to be entered, indicated that it recognized the propriety of permitting certain types of theatre acquisitions in the future, coupled in certain instances with approval by the court. It said (R. 3562):

"But it [the decree] shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this court or other competent authority shall approve the acquisition after due application is made therefor."

Despite this statement, however, the court, when it finally entered the decree, incorporated the injunction against expansion, and denied the defendants the right to apply to the court for relief in specific instances.

We urge that this provision of the decree running counter, as it does, to the opinion, and without support in the record, should be eliminated. In view of the insignificant position which these defendants have in the exhibition field, it is clear that the acquisition of additional theatres would not, *per se*, result in any monopoly or other violation of the anti-trust laws.

Twentieth Century-Fox and National have no theatres in 29 states. Moreover, in the 92 largest cities of the United States, those having a population of 100,000 or more, these defendants have theatres in only 17 of such cities. For example, they have no theatre in Chicago, Boston, St. Louis, Baltimore, Washington, Minneapolis, St. Paul, Dallas, Atlanta, Louisville, Indianapolis, Birmingham, Fort Worth, Houston, San Antonio, New

Orleans, Cleveland, Columbus, Oklahoma City, Tulsa, Omaha, Des Moines, or 53 other cities having a population of 100,000 or more.

It is manifest that the acquisition of new theatres in areas where they do not now operate, and particularly where other defendants or large circuits have theatres, would promote and stimulate competition rather than restrain it. Certainly the erection by Twentieth Century-Fox of a new theatre in Washington would be in the public interest and would stimulate, rather than restrain, competition.

Apart from this consideration, however, the injunction in question seriously affects the normal business operations of the defendants. The court has held that it is proper for National to continue its operations in the areas in which it now has theatres. Yet, the restrictions contained in the decree effectively imperil even that business. In serving the communities where it now has theatres, National must be permitted to develop its business in line with the needs of those communities. It is obvious that in order to maintain its business it will be necessary from time to time to build or otherwise acquire other newer and more modern theatres in order to keep pace with the growth of these communities and changing factors in the theatre field. Shifts of population and new building developments may likewise require additional theatres. If National is to serve the territory which is contiguous to the community now served by it, it must be permitted to construct new theatres.

These are considerations which are wholly unrelated to any issue of "expansion" as the term has been used by the plaintiff in this case. They are but incidents of normal business development and growth. No reason exists to deny them to these defendants.

There is nothing in the history of the acquisitions by National during the last decade which would indicate any purpose on its part to acquire a substantial number of additional theatres. As above stated, the district court found that National had an interest in 636 theatres at the time of trial. This we think erroneous and that the accurate number was 581. But be that as it may, the net increase in the number of its theatres from 1938 to 1945 was but 25, which is at the average rate of a little more than 3 a year. In that same period the net increase of all theatres in the United States was over 4,000 (Finding 118, R. 3684).

While no injunction against the acquisition of additional theatres should be contained in the decree, we submit that, if the present language be retained, provision should be made to permit a defendant to come to court for approval of any acquisition upon a showing that the proposed acquisition would not unduly restrain competition in exhibition. We contend that the very least to which these defendants are entitled is a qualification along these lines. We see no justification for denying to the defendants the opportunity of demonstrating to the satisfaction of the court that a proposed theatre acquisition would not restrain competition and therefore should be permitted. To carry this provision, which is obviously punitive, to the extent of condemning theatre acquisition, without regard to its purpose or effect, can, we submit, find no support in authority. See *U. S. v. Bausch & Lomb Co.*, 321 U. S. 707, 726; *Labor Board v. Express Pub. Co.*, 312 U. S. 426.

While we do not contend that the precedent is controlling, we point out that in *U. S. v. Crescent Amusement Co.*, 323 U. S. 173, the United States appealed from that part of the decree dealing with future acquisition of theatres and asked this Court to substitute for the lower court's decree a provision

restraining future acquisitions "except after an affirmative showing that such acquisition will not unreasonably restrain competition". That was done (323 U. S. 173, 185, 187). We also suggest that in *United States v. Schine*, recently argued here, Section III of the decree entered July 2, 1946, provided:

"No defendant shall acquire a financial interest in any additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition. Such showing shall be made before this court upon reasonable notice to the Attorney General at Washington, D. C."

The United States did not appeal.

THIRD: THE DECREE SHOULD BE MODIFIED SO AS TO PROVIDE FOR THE CONTINUANCE OF THE ARBITRATION SYSTEM ESTABLISHED PURSUANT TO THE CONSENT DECREE AND FOR THE ARBITRATION OF DISPUTES UNDER THE DECREE.

The pleadings upon which the hearings were held are the amended complaint filed November 14, 1940 (R. 3137-3201), and the motion to modify the decree, filed August 7, 1944 (R. 3414-3419).

The amended complaint filed after substantial discovery proceedings, both by way of examination of officers of the defendants on oral depositions and answers to searching and voluminous interrogatories (R. 3199-3200), prays that a nation-wide system of impartial arbitration tribunals, or such other means of enforcement as the court may deem proper, be established to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained in the decree. In the decree entered on consent on No-

vember 20, 1940, an arbitration system was established and the American Arbitration Association was made administrator of that system (R. 3373, 3376, 3377, 3378, 3379, 3382-3386, 3392, 3395-3400, 3402-3413).

The system worked well. Tribunals were established in each of the 31 exchange cities and a panel of 1065 outstanding citizens nominated by the American Arbitration Association to serve as arbitrators. At November 1, 1945, 416 proceedings had been begun—approximately three-fourths related to clearance. Legitimate grievances were corrected. There had been 283 awards. In 177 some relief was granted (Ex. W-16, Schedule III), thus demonstrating the effectiveness of arbitration to solve exhibitors' grievances.

In its application for a modification of the decree filed August 7, 1944, the plaintiff not only did not ask for a discontinuance of the arbitration system but rather sought an extension of it so as to make arbitrable a claim by an exhibitor that motion pictures had been licensed by a distributor upon terms which had the effect of unreasonably restraining competition between two or more theatres in exhibiting such pictures. The plaintiff proposed that the arbitrator should be authorized to make an award which would proscribe the specific course of conduct found by him to violate the decree and require the payment of an amount of money which would compensate the complainant for any pecuniary loss sustained as a result of a violation, and discourage the recurrence of such violations.

Yet, at the trial, the Special Assistant Attorney General who was trial counsel for the plaintiff was unwilling to consent to a continuance of the arbitration system at all. The district court apparently considered consent of the plaintiff necessary, and, lacking it, regretfully decreed the termination of the

arbitration system. In this respect, we think it underestimated its power.

In its opinion the court said:

"Counsel for the five major defendants and their subsidiaries contend that the consent decree has, in some respects at least, the effect of a final judgment which may not be modified. But we cannot see how such a position is consistent with the language of Section XXIII (d), which permits '* * * any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of the decree for any modification thereof.' That period has expired, and therefore everything relating to rights under and remedies for violation of the Sherman Act is, therefore, open for consideration, even as between consenting parties; and certainly nothing has hitherto been decided which affected the non-consenting parties. It would seem to follow that we cannot bind any parties to subject themselves to the arbitration system or the board of appeals set up in aid of it without their consent, even though we may regard it as desirable that such a system, in view of its demonstrated usefulness, should be continued in aid of the decree which we propose to direct." (R. 3516)

Finding 160 is as follows:

"160. The arbitration system created by the Consent Decree of November 20, 1940, has demonstrated its usefulness in dealing with exhibitors' complaints of unreasonable clearance and if extended to cover differences which may occur under the system to be established by the Decree herein, will be effective and result in quick and expeditious decisions and a saving of time and money." (R. 3690-3691)

In its supplemental opinion of December 31, 1946, the court said (R. 3702):

"The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

"Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that 'a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein.'

"We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree."

In the first place, the consent given by the plaintiff in 1940 was not limited to the three year trial period referred to in Sections XXI or XXIII (R. 3395, 3400). That period was primarily related to the time during which the plaintiff was not free to seek divestiture of theatres. While, of course, the arbitration system could be modified or even abolished by the court under the modification clause in Section XXIII of the decree,

that only could be done by evidence and for cause. *Chrysler Corporation v. U. S.*, 316 U. S. 556; *United States v. Swift & Co.*, 286 U. S. 106; *United States v. Radio Corporation of America*, 46 F. Supp. 654 (D. C. Del., 1942). Certainly, at the end of three years the district court would not have been required, contrary to its own judgment, to terminate the arbitration system because the plaintiff withdrew its consent.

The court below found, as a fact,

(1) that arbitration was a particularly appropriate and efficient remedy;

(2) that actual use of arbitration, following the entry of the consent decree, had demonstrated the effectiveness of that remedy; but

(3) concluded that, in the absence of consent of the plaintiff, it was without power to impose what it had found to be an appropriate remedy for meeting the situation.

The need for this proper remedy is even more imperative under the final decree of the court below. That decree necessarily speaks in general terms, particularly with respect to the distribution procedures enjoined. Unreasonable clearance is prohibited. Clearances between theatres not in substantial competition are prohibited. But, practically, as between a theatre in Arcadia, and one fourteen miles distant in Dodge City, what does that mean? Is fourteen day's clearance reasonable? Are the theatres in substantial competition? Who is to decide?

Under Section II 8 of the final decree, pictures are required to be licensed to the highest bidder having an adequate theatre. But, since license terms for the better pictures in the larger theatres are not expressed in specific dollars but in percentages of prospective income, there is considerable room

disagreement as to which exhibitor in fact offered the best terms. As the district court pointed out, arbitration of those disputes is the best and cheapest procedure (R. 3558).

Of course, use of an arbitration system is not to be mandatory. Rather it is to be auxiliary. The exhibitor who feels aggrieved may bring suit under the Sherman Act, or may persuade the Department of Justice to favor his cause in a contempt proceeding.

If it should be deemed that the plaintiff never consented to a permanent arbitration system, or that the Special Assistant Attorney General had the power to revoke the plaintiff's consent, nevertheless, we submit that the district court had the power to authorize the maintenance by consenting defendants of an appropriate arbitration system under rules and procedures approved by the district court as a convenient, cheap, expeditious, auxiliary enforcement procedure.

Decrees in Sherman Act cases must necessarily be hand-tailored. *International Salt Company v. The United States of America*, decided November 10, 1947; *United States v. National Lead Co.*, 332 U. S. 319; *U. S. v. Crescent Amusement Co.*, 323 U. S. 173; *Siegel Co. v. Trade Comm'n.*, 327 U. S. 608.

Where, as here, at least five of the defendants are willing to arbitrate alleged breaches of the decree and to support for that purpose an arbitration system maintained under the control and supervision of the American Arbitration Association, we submit that the district court had the power, as it certainly had the inclination, to include such a system within its decree.

ARGUMENT AS APPELLEES

We here reply to the plaintiff in No. 79.

Before discussing the specific arguments which we think erroneous, we direct attention to the general philosophy and structure of the plaintiff's brief.

The facts concerning the individual status of these two defendants, Twentieth Century-Fox and National Theatres Corporation; are fully set forth, *supra*, and the plaintiff's brief does not controvert them.

We contend that both with respect to the matters covered in our argument and those relevant to a determination of the adequacy of the decree entered by the court below, those are the only controlling facts which should enter into the judgment of this Court. These two defendants cannot be "lumped" together with all other defendants to the end that the statistical results of such a joinder can be used as a basis for a hypothetical "monopoly" argument.

Though the plaintiff states, in the preface to its brief (p. 11), that it does not challenge the evidentiary findings of the court below and will rely upon them, its argument and its entire concept of the issues wholly negate that statement. The court below held that "the five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition" (R. 3553). Yet the plaintiff's argument, in the main, completely ignores this basic finding. It proceeds as though its claims of monopolization in the exhibition field had been sustained, rather than specifically rejected.

Space does not permit us to call attention to every one of the many instances in which the plaintiff has resorted to this "collective approach" in its presentation of what it calls the "Facts." Nor can we advert to every instance where the plaintiff attempts to prove its point by catchphrases and character-

izations. These run throughout its brief. Their persistent use, we contend, is improper and meaningless.

We therefore point out that our restraint from exposing each instance of the impropriety of this "collective approach" and each use of such phrases as "cross-licensing," "vast theatre holdings," "established proclivity," "integrated vertical combinations," and "market control," indicates no acceptance of plaintiff's technique.

The plaintiff, in the preface to its brief (p. 11), also states that its appeal is to be confined largely to the adequacy of the relief granted by the court below. This statement would lead to the expectation that the plaintiff would analyze the various trade practices, which the court below determined to be illegal, and demonstrate how the specific injunctions and other affirmative relief, granted with respect thereto, were inadequate. No such presentation is made. We will show that none is possible.

Upon analysis, we submit that all that the plaintiff's brief offers in this respect is: (a) A blanket condemnation of the decree below; (b) an unreasoned prophecy that the court's injunctions will be ineffective; (c) a dissatisfaction with the refusal of the court to accede to the plaintiff's plea for divorce-ment and (d) a plea for more severe injunctions (what the plaintiff calls a ban on "cross-licensing"). This last approach, we shall demonstrate, has been injected with the thought that even though this Court would affirm the court below on the divorce-ment issue, it could be led into framing a decree which, by injunction, would impose such severe restrictions upon these defendants as to force upon them theatre divestiture as a practical matter.

In this reply we will first deal with the adequacy of the decree and then consider the plaintiff's arguments as to divorce-ment.

FIRST: THE INJUNCTIONS CONTAINED IN THE DECREE, TOGETHER WITH THE AFFIRMATIVE RELIEF GRANTED BY THE COURT, ARE ADEQUATE TO BRING THE CONDUCT OF THE DEFENDANTS INTO HARMONY WITH THE ANTI-TRUST LAWS.

We have already referred to the trade practices which the court below found illegal and described generally the injunctive provisions which were directed to each one of them. We also summarized the additional relief granted by the court, namely, the requirement of the competitive licensing of runs, which was designed to eliminate any rigidity in the playing position of theatres or the availability of product.

The plaintiff in its brief has also enumerated the practices which the court below determined to be illegal, but leaves the impression that the court below did nothing whatsoever to eliminate them. Therefore, despite our prior reference to the decree, we here list the practices which the court criticized and analyze the relief contained in the decree with respect to each of them.

Our discussion of the relief granted, against the background of the court's opinion, does not, however, carry with it any concession that these defendants have, in fact, violated the Sherman Act. As stated in our appellants' brief, there was no direct proof of conspiracy or combination, and the finding of law violations is based upon inferences and implications from similarity of conduct, which, in our belief, were unjustified.

Admission Price Fixing.

We believe that the condemnation by the court below with respect to the fixing of admission prices was occasioned because of contracts and conspiracies which it found to exist

among distributors and exhibitors to maintain a rigid system of runs, clearances and prices. We do not think that the record in this case presented the issue of the right of a single producer of a motion picture to agree with its non-exclusive licensee as to the admission price it will charge the public for witnessing the exhibition of the picture. On such a limited issue we think there could be no denial of the producer's right.

But be that as it may, the injunctive remedy in this decree is against all forms of price fixing. It is sweeping and unequivocal. It would be difficult to phrase a prohibition in more comprehensive language.

Clearance.

The court below, while sustaining the legal validity of agreements for clearance between runs, struck down all clearance systems (which had resulted in uniformity and rigidity) and prohibited clearances between theatres not in competition with each other. It made the distributor responsible for the length of clearance, as to time and area, by placing on the distributor, who is a party to the decree, the burden of justifying any clearance attacked.

This is certainly adequate relief. Short of prohibiting the distribution of motion pictures on runs with contractual clearance between them, which is unthinkable, the relief granted is comprehensive and complete. We say unthinkable because, as the court below found, clearance is essential in the distribution of motion pictures (Findings 75-78, R. 3673-3674), and has made possible motion picture entertainment in nearly every community in the country, at admission prices within the reach of all.

Franchises.

The decree prohibits any licensing agreements for pictures to be released over a period of more than one year. Again, the relief is sweeping. While it may be, as the court below seemed to believe, that some franchises had been used by exhibitors to attempt to monopolize the supply of motion pictures, that could not have been true of the great bulk. Nevertheless, to avoid classification into the good and the bad, the decree prohibits all. And in addition to this, it was established that none of the defendants who were parties to the consent decree had entered into any franchise since June 1940—almost eight years ago.

Master Agreements—Formula Deals.

Here, too, the decree prohibits all. We believe that, in the main, master agreements were used by a distributor and an exhibitor operating a number of theatres primarily as a matter of convenience, and that the essential terms for each theatre, as they appeared on the "deal sheets" annexed to the master agreement, were negotiated theatre by theatre. But be that as it may, there must be a separate contract for each theatre in the future.

So, too, formula deals, which were primarily a labor-saving method of negotiating arising out of a distributor's effort to secure higher film rentals based on its assertion of the superior quality of its pictures, are absolutely prohibited.

Conditioning.

By the decree, a distributor is prevented from conditioning the licensing of one of its pictures on the exhibitor's agreeing to license another. While there is considerable proof that each of the distributors licensed many of its pictures together on a single contract—either a season's output in the case of

some of the companies, or in small blocks as in the case of others—there is no proof of conditioning. And if there were, it is difficult to see the inherent illegality.

But again the injunction here is complete. Each individual picture must be offered individually—the buyer (the exhibitor) is to have his choice of those he will license.

And, as a complement to this requirement, the distributor must offer the pictures theatre by theatre. It is not only that a circuit exhibitor may not demand that the pictures be licensed to *all* of its theatres, as a condition to licensing them in some of its theatres, but that the distributor cannot say to an exhibitor, "If you want to exhibit my pictures in one of your theatres, you must exhibit them in all."

Pooling Agreements.

The joint operation of two or more competing theatres, one owned by a defendant and the other by another, defendant or stranger, is prohibited by the decree (III, 2). This provision has been complied with (Report filed July 1, 1947). It is inconceivable that there will be any violation of this specific prohibition against making like agreements in the future.

Rigidity in the Run and Clearance Structure.

As its remedy against the rigid system of runs and clearances found to exist, the court below established a system of licensing which has come to be called competitive bidding—or, by its more articulate opponents, auction block selling.

There is a considerable divergence of attitude among the defendants toward it. Four of the defendants—Twentieth Century-Fox, Loew's, RKO and Warner—are quite willing to try it. Twentieth Century-Fox does not endorse the prophecies of ruin and destruction voiced by some of the other defendants.

True, it has difficulty in wholly comprehending the precise requirements of the controlling paragraph (Decree II, 8) but it has faith in its ability, with the assistance of the district court, to establish a fair and workable system.

In addition to this specific remedy, the decree (II, 9) establishes a general standard that an exhibitor who seeks a specific run may not be arbitrarily refused it.

(a) Plaintiff fails to establish that the decree is inadequate.

What does the plaintiff offer to convince this Court that this judgment below was erroneous or would be ineffective? Its brief, it is true, contains repeated prophecies that the decree will be inadequate. But such unsupported prognostication is scarcely an answer to its apparent effectiveness. It is also suggested that in the eyes of the plaintiff, the defendants have a "proclivity" for contumacious conduct and there is the intimation that they might violate the decree. We are sure that this Court has adequate confidence in the efficacy of the power of the district court to deal with any such conduct, if, contrary to our belief, it should develop.

(1) Plaintiff's references to prior proceedings and regulation are irrelevant.

Next, the plaintiff points to a number of other anti-trust proceedings which, over the years, have been instituted by it and private individuals against companies formerly in the motion picture business or against one or several of these defendants. We think it clear that these proceedings have been referred to solely to create prejudice. It is, of course, true that the motion picture industry has been, from its very beginning, a litigious one. But it is a far cry to say, for example, that the efforts of unidentified persons thirty years ago to enforce

or invalidate patents on motion picture equipment, can be used as an indictment of the conduct of the present responsible officers of these defendants.

Moreover, it is significant that plaintiff in its references to prior litigation in this field has seen fit to ignore those cases in which the decisions have been in favor of the defendants, such as *Westway Theatre v. Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830; aff'd 113 F. 2d 932; *Gary Theatre Co. v. Columbia Pictures Corp., et al.*, 3 C. C. H., Fed. Trade Reg. Serv., p. 26,210; aff'd 120 F. 2d 891; and *Rolsky v. Fox Midwest Theatres*, C. C. H., Fed Trade Reg. Serv., p. 6442, to name a few.

The varying decisions in these prior anti-trust proceedings, if they have any bearing on this case, disprove the existence of any national pattern or any overriding conspiracy. In some of them, one or more defendants have been found to have violated the Sherman Act, while co-defendants have been absolved. In some local situations it has been adjudged that no basis existed for a finding of conspiracy or wrongful conduct on the part of any of the defendants. In others, involving some of the same trade practices in a different setting, the defendants have been held liable. Such disparity in the outcome of these cases would not exist if these defendants had been parties to any conspiracy on a national scale.

Thus, we say that plaintiff's references to this history of litigation in nowise advance its argument that "experience shows that no judgment which merely regulates defendants' trade practices can give adequate relief" (Brief, p. 72). We will not analyze those cases in detail. Suffice it to say, they represent, over the span of thirty years, litigation involving many and varied issues and many differing local factual situations. It is interesting to note, however, that though these

defendants have owned theatres ever since the first one of these proceedings was commenced in the '20s, it was not until the case now before this Court was instituted that the plaintiff advanced the claim that the ownership of theatres was illegal.

In describing steps taken in the past to regulate trade practices, the plaintiff has referred to the NRA Code which was in effect from December 1933 to May 1935 (Brief, p. 85). As plaintiff says, during that period local clearance and zoning boards were set up by the Government for the purpose of establishing reasonable periods of clearance. The plaintiff fails, however, to set forth the full experience flowing from the activities during this period when the NRA was effective,—an experience which has had a far-reaching effect upon some of the issues in this case, and requires amplification.

The local clearance and zoning boards were composed of representatives of all branches in the industry. They were established to secure impartial, unbiased determinations. Plaintiff's suggestion that they were dominated by the distributors is unworthy and finds no support in this record or elsewhere. When codes were promulgated by these local boards they were required to be submitted for approval by the Code Authority in Washington, which certainly was entirely independent of the distributors and their affiliated theatres.

With respect to the Los Angeles area, the local clearance and zoning board did establish a Code which set forth the determinations of that board as to reasonable clearances. This was approved by the Code Authority in Washington. There was thus put into practical operation the determination of this representative board in the industry as to clearance. Naturally, all of the distributors, as they were required to do, then licensed their pictures in accordance with this determination. Necessarily the result was that the clearance applicable to the pictures of each distributor was uniform.

Then the NRA was declared unconstitutional. Thereafter, although there was no law compelling the distributors to adhere to the clearance set up under the Code, nevertheless, those clearance schedules did represent an objective determination as to what was fair and reasonable. In consequence, each distributor in the main continued to license its pictures on that same basis. It, indeed, would have been extraordinary had they not done so. If any radical changes had been made, if there had been any significant departures from such schedules, the distributors would then have been accused of discrimination and arbitrary action.

We refer to this history because it shows how certain aspects of uniform conduct in this industry came into existence. It does not, we submit, furnish any support for plaintiff's argument that regulation by decree is inadequate.

(3) Plaintiff's criticism of affirmative relief is unfounded.

In commenting on the affirmative remedy of the competitive licensing of pictures, the plaintiff does attempt to become specific in belittling its effectiveness. While no one can prophesy with certainty that this new method of distributing motion pictures will be effective, we submit that the plaintiff's indictment of it is unjustified.

Plaintiff suggests that the independent exhibitor will be at a disadvantage because a defendant, having an opposition theatre, has greater resources and will be able to pay higher prices for desired pictures. If the plaintiff means that a defendant, in such a bargaining for product, will outbid his competitor over and above any fair value of the picture, solely for the purpose of keeping it away from his rival, it is, without reason, imputing conduct which would border on the contumacious. On the other hand, if it means that in a competi-

itive market a defendant might have greater resources and thus, in some instances, be better equipped to compete, we ask, "Is that unlawful?" We know of nothing in the anti-trust laws which requires that every competitor for motion picture films or any other commodity, be placed upon an equal financial footing.

If the market is open, if the ability fairly to compete is unrestrained, every requirement of law is met.

What this decree does—its plain and apparent effect—is to break up what the plaintiff has condemned, and the court has found, to be a rigid system. It eliminates the "old" or "regular" customer philosophy in this industry. Any independent, competing with one of these defendants in the exhibition field, will now have complete freedom to bargain for product. Any exhibitor, wishing to enter into business in any community where a defendant today has the only theatres or the better theatres, can do so and have available to him such product as he desires. This, we say, is all that he is entitled to under the anti-trust laws or, indeed, under any concept of fair business practice in a free society.

The plaintiff also urges that this so-called competitive bidding system is unworkable (Brief, pp. 69-71). That argument boils down to the contention that many controversies will arise in connection with the practical administration of this system and that the determination of these controversies would be burdensome to the Department of Justice and to the district court.

The first answer is that the court below was fully aware of the administrative problems incident to its decree. It did not consider them to be insurmountable and wisely retained the power to modify the decree in the light of experience.

The second answer to this argument of inconvenience is that the court below recommended, and five of the defendants

advocated, the continuance of an arbitration system which would provide an effective, inexpensive and expeditious determination of such controversies. And it is highly likely, we believe, that the other three defendants would also join in such a system. It is the plaintiff itself which is the bar to the establishment of that system. It is responsible for the present decision which has terminated the system which has worked so effectively since 1941. It comes with poor grace for plaintiff here to magnify administrative difficulties which, but for its own intransigence, could be so easily resolved.

SECOND: THE OWNERSHIP OF THEATRES BY TWENTIETH CENTURY-FOX IS LAWFUL AND PLAINTIFF HAS ESTABLISHED NO BASIS FOR A DECREE OF DIVESTITURE.

(a) The Plaintiff's Contentions When Applied to Twentieth Century-Fox and National, Independently, Provide No Justification for Divorcement.

In Point II A of its brief (pp. 90-114) plaintiff argues that the ownership by Twentieth Century-Fox of theatres is illegal, even when that company is considered separate and apart from the other defendants. It is only in this section that it actually treats with the individual defendants as such, and comes to grips with any really relevant issue on this appeal.

Even under this point, however, the plaintiff cannot forego its propensity to characterize. It refers to the simple situation in which Twentieth Century-Fox, a producer and distributor of motion pictures, owns theatre interests through its wholly owned subsidiary, National Theatres Corporation, as an "integrated vertical combination." But this exercise in semantics does not advance its case. Its argument must be judged against the facts with respect to any actual monopolization or control

of the market which arises from, or because of, that integration. The record is barren of any evidence of this and the court below expressly found that it did not exist.

We pass to a consideration of the claims of the plaintiff with respect to what it calls the "two serious trade-restraining consequences" (Brief, pp. 91-92) of the ownership by Twentieth Century-Fox of theatres. The first is that, to the extent that Twentieth Century-Fox as a producer can supply the exhibition needs of its theatres, the market is closed to other distributors. The facts concerning the theatre position of Twentieth Century-Fox demonstrate how unsubstantial is the argument. Obviously, the only segment of the market over which this fancied control could exist is that in which Twentieth Century-Fox has theatre interests. As we have heretofore stated, its theatre holdings represent only about 3.52% of the country's theatres. Again, as we have emphasized, in the special so-called "market" which the plaintiff has artificially created, consisting of the 92 largest cities with populations of over 100,000, Twentieth Century-Fox has theatres in only 17. In each of these 17 cities, there are competing theatres and in all except one there are theatres which compete on first-run. In each of the great cities of New York, Philadelphia and Detroit, Twentieth Century-Fox has only one theatre.

In the 320 cities of the United States which have populations between 25,000 and 100,000, Twentieth Century-Fox has theatre interests in only 38; and in the 1,630 communities with populations between 5,000 and 25,000, it has theatre interests in only 102. On such a record, it is preposterous to maintain that the ownership of these theatres could represent control of a substantial segment of any market.

But more than this, plaintiff does not even urge that there is any complete control, even in this restricted segment. The

exclusion which is claimed to exist is not a complete exclusion of the product of other distributors from these theatres, but only the limited partial exclusion which comes from the fact that Twentieth Century-Fox itself supplies varying proportions of their film requirements. This is apparent from other portions of plaintiff's brief where it concedes—and indeed argues—that in the great majority of communities, theatres cannot exist on the product of one company but require, for the most part, the product of a number of distributors.

The shallowness of the plaintiff's argument can best be appreciated by considering it in reference to a typical situation, such as Long Beach, California. There are 20 motion picture theatres in that community, only seven of which are theatres in which Twentieth Century-Fox is interested. Two of these seven theatres are operated as first-run theatres. An independent operator in the community also operates two first-run theatres (R. 2131-2132a). Leaving out of consideration the subsequent run "market" in Long Beach which requires the product of all distributors to supply the numerous policy changes which are in effect in subsequent run operation, a study of the first-run situation shows how ephemeral is the plaintiff's contention of market control. The two first-run theatres operated by the independent were, at the time of the trial, generally exhibiting the product of RKO, of Columbia and about one-half the product of Warner and Universal, together with other product offered by non-defendant distributors. The two theatres in which Twentieth Century-Fox is interested were exhibiting the product distributed by Twentieth Century-Fox and, generally, the product distributed by Loew's, Paramount and about one-half of Warner and Universal.

In the light of these facts, what is this "market control" of which the plaintiff complains? It is simply this: Though the

theatres in which Twentieth Century-Fox has no interest furnish exhibition facilities for substantially one-half of the available motion picture product, and though the product of other distributors consumes about 75% of the playing time of the theatres in which Twentieth Century-Fox has an interest, the fact that the product distributed by Twentieth Century-Fox itself occupies about 25% of the playing time of the Fox theatres and about 15% of the playing time of all first-run theatres in Long Beach, justifies the charge that there has been such an "exclusion" of other distributors as to constitute the illegal control of a "substantial segment of the market." The statement of the point is its best refutation.

The second alleged serious trade-restraining consequence (Brief, p. 92) is simply the reverse of the foregoing argument. Plaintiff says that where Twentieth Century-Fox has theatres, other exhibitors in that community are excluded from the opportunity of licensing Twentieth Century-Fox pictures on those runs, which are "reserved for Fox's theatres." Applying this argument again to the situation existing in Long Beach, California, it comes down to this: Naturally, Twentieth Century-Fox wishes to exhibit its own pictures first run in its own theatres. Therefore, its competitors in Long Beach cannot secure those pictures on that particular run. But as we have heretofore pointed out, and as the court has found, the pictures produced by Fox are only approximately 9% in number of those produced in the United States.

Thus, at most, the plaintiff's argument is reduced to the claim that because the competing theatres in Long Beach are "excluded from access" to 9% of the product, though having available to them 91%, there is an improper restraint. Such a contention is supported by neither precedent nor reason. The plaintiff's position, as stated in its brief, is that

"But no manufacturer, whether of a copyrighted or an uncopyrighted article, has the right deliberately to acquire control of a particular market for his product when the purpose or necessary effect is to exclude others from an important segment of the market." (p. 103)

We need not debate the soundness of this argument. When applied to this case, the foregoing facts demonstrate its irrelevancy. The ownership of theatres by Twentieth Century-Fox has neither the purpose nor effect of excluding others from any important segment of the market.

(b) Corporate Relationship of Twentieth Century-Fox and National Furnishes No Basis for Divestiture.

The plaintiff seeks to buttress its argument with respect to the claimed illegality of theatre ownership by urging that because the theatres in which Twentieth Century-Fox is interested are owned by a subsidiary corporation, all of the stock of which is owned by Twentieth Century-Fox, an unlawful "combination" exists. In other words, the argument is that by owning theatres through a wholly owned subsidiary, rather than directly, an additional element of law violation exists.

With respect to this argument, it should be noted that no such issue was tendered on the trial of this case. No evidence was introduced to show that Twentieth Century-Fox and its wholly owned subsidiary were engaged in any separate conspiracy or combination. The court below made no finding even remotely indicating that any of the improper agreements and practices to which it referred were between this defendant and its subsidiary, or arose out of the intercorporate relationship. The court below properly regarded theatres owned by Twentieth Century-Fox, through its wholly owned subsidiary,

as the theatres of the parent company for the purpose of determining whether there had been a violation of the Sherman Act.

We submit that the argument of the plaintiff, based upon the existence of these two separate corporate entities, is nothing but an unfounded attempt to avail itself of the decision in *General Motors Corp. et al. v. United States*, 121 F. 2d 376; cert. den. 314 U. S. 618, which it cites. In that case the violation of law was the suppression of competition among credit companies for the business of financing General Motors dealers and customers. What was done would have been just as illegal if done by General Motors itself rather than by it and its subsidiary, General Motors Acceptance Corporation. Nor is there any resemblance to *U. S. v. Crescent Amusement Co.*, 323 U. S. 173, where the separate corporate entities in the combination were separately owned and controlled.

Thus, we urge that the plaintiff's endeavor to support its argument by urging that the corporate structure brings about a "continuing conspiracy among each group of affiliated corporations" (Brief, p. 103) is without substance. The nature of the ownership is unimportant. Only its purpose, scope and effect are significant. We borrow a phrase used in plaintiff's brief (p. 95) and taken from the opinion in *United States v. Yellow Cab Co.*, 332 U. S. 218, 227: "... the Sherman Act looks to substance rather than form ..."

(c) No Illegality in the Origin or Purpose of Theatre Ownership.

The plaintiff also asserts that illegality attached to the original acquisition of the theatres. Here, again, an argument is advanced which is in direct conflict with the findings of the court below (Finding 152, R. 3689-3690). No evidence was

introduced by the plaintiff on the trial of this action to establish that the acquisition by any defendant of theatres was accomplished by improper activities or motivated by improper purposes. On the contrary, these defendants introduced evidence showing that their theatre acquisitions were a natural and normal business development; that many of these theatres were secured in a highly competitive market; and that the development of these theatre interests had been in nowise affected by the distribution activities of Twentieth Century-Fox. The record is barren of any evidence to support a claim that the original acquisitions were the result of any conspiracy, concert of action or intent to monopolize.

In inveighing against the purpose of this theatre ownership, the plaintiff arrogates to itself the role of economist. It condemns such ownership because it says that there is no "economic justification" for it (Brief, p. 105). It cavalierly avers that there is no reason why independents cannot operate theatres as well as the defendants and that there is no "saving to the patron" in integration. Plaintiff's argument is built upon the unsupported and erroneous premise that, "assuming two theatres of equal quality and location, a picture will attract as many patrons in one as in the other" (Brief, p. 105). Certainly the picture is important. Certainly the theatre building and location are important. But successful exhibition is also controlled by the calibre of management, its ability in exploitation and advertising, its solicitude for patrons, and its capacity to furnish public service.

But even if it be assumed that plaintiff's "economic" argument is sound, we are at a loss to understand what it proves. We had not supposed that the law required a business organization, which entered a field in a perfectly lawful and proper way, because it believed that its overall business

could be better and more profitably conducted, to demonstrate to the satisfaction of the Department of Justice that the results would be "economically" beneficial.

Apart from this, however, the basis of plaintiff's contention is fallacious. The record amply supports the conclusion that the operation of theatres by these defendants has been beneficial to the public. It shows that those theatres have been managed by skilled and experienced operators; that the facilities afforded to the public through the defendants' theatres have been the finest available; that the public has been well served; and that the experience of these defendants in the entire motion picture field peculiarly qualifies them, through their officers and employees, to provide theatre facilities of the highest standards. While we recognize that this would be no defense to a claim of monopoly or illegal combination, it is an ample answer to the plaintiff's argument that no public benefit comes from theatre ownership by Twentieth Century-Fox.

Plaintiff has attempted to link the origin and development of the trade practices, which were criticized by the court below, to integration (Brief, pp. 27-29). It says that what it terms "licensing restrictions", namely, provisions in license agreements dealing with runs, clearance, admission prices, etc., did not come into existence until after integration commenced. This is completely contrary to fact and is abundantly disproved by the record. Indeed, plaintiff's amended and supplemental complaint, on which the action was tried, expressly alleges (paragraphs 114, 115) that runs, clearances and advanced admission prices were practices which came into existence as far back as 1915 or 1916—prior to the time when any defendant owned theatres. The initial acquisition of theatres by Twentieth Century-Fox was in August 1925 (paragraph 42). Plaintiff's brief recognizes that these provisions in license agree-

ments were in existence in 1923. Thus, from its brief and its pleadings, it affirmatively appears that the trade practices to which plaintiff refers antedated the acquisition of theatres by Twentieth Century-Fox. In addition, there is testimony in the record that these practices have been in use since the beginning of the production of feature motion pictures. Neither their origin, development or use has any relation whatsoever to integration.

In concluding our discussion of this point, one further argument by excoriation on the part of the plaintiff should be noted. The plaintiff says:

"This persistent use of their theatres as a means of arbitrary suppression of the competition of others is itself conclusive evidence of the unlawful purpose of the major defendants' vertical integrations." (p. 105)

This statement is made in spite of the fact that there is no evidence and no finding that the defendants, or any of them, have used their theatres, persistently or otherwise, as a means of suppressing theatre competition. There is no evidence that any potential theatre operator has been kept out of business because of anything done by these defendants. And as the record so convincingly shows, if there were any efforts directed at the suppression of competition, they assuredly were most inept and ineffectual. In the last seven years the number of theatres in this country has increased over 4,000. Well over 90% of these 4,000 theatres have been built and are operated by independents and the defendants have no interest in them.

The authorities to which plaintiff has referred in its discussion of integration are plainly distinguishable. For example, *United States v. Lehigh Valley R. R. Co.*, 254 U. S. 255, to which plaintiff frequently refers, was one of a series of cases in-

volving the ownership by railroads of coal mines and their unsuccessful attempt to avoid the prohibitions of the commodities clause of the Hepburn Act (34 Stat. 585) by the organization of coal and sales companies owned by the stockholders of the railroad but dominated by the management of the railroad. In *United States v. Yellow Cab Co.*, 332 U. S. 218, the sufficiency of a petition against a motion to dismiss was upheld which alleged that a monopoly of the cab business in certain large cities had been acquired which had as its express purpose the elimination of all competition among cab manufacturers in the sale of taxicabs to the principal taxicab operators in those cities. In the petition it was alleged that the monopoly had accomplished its purpose, with the end result that "the public is charged higher rates for the transportation services rendered." *United States v. Swift & Co.*, 286 U. S. 106, involved applications for modifications of a consent decree entered in 1920. As the Court repeatedly remarked in its opinion, that decision did not purport to adjudicate the appropriateness of the remedy consented to by the defendants, but dealt only with the question of whether a sufficient showing had been made to justify modification over the opposition of the Government and the parties who were protected by the consent decree.

THIRD: THE RECORD FURNISHES NO JUSTIFICATION FOR AGGREGATING THE THEATRE INTERESTS OF THE DEFENDANTS, AND PLAINTIFF'S ARGUMENTS FOR DIVESTITURE BASED UPON SUCH AGGREGATION ARE WITHOUT MERIT.

We believe that all of the plaintiff's arguments, which are based upon statistics and other material resulting from an aggregation of the theatre interests of all of the defendants, are completely irrelevant and unimportant on this appeal. The

judgment of the court below that the plaintiff's "collective approach" was unjustified; and that in any event it furnished no proof of monopoly, is abundantly sustained by the evidence.

We deem it unnecessary, therefore, for us to demonstrate here what has effectively been done in the brief for Loew's, that even on the basis of such aggregation and collective treatment no monopoly or other restraint exists which would justify theatre divorcement.

Furthermore, we think that the record convincingly sustains the finding of the court below that the "illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors." (Finding 154, R. 3690). This conclusion applies whether the defendants are treated collectively or regarded individually.

There are, however, certain broad statements in plaintiff's brief in support of its effort to "collectivize" these defendants, which must be challenged.

1. Plaintiff asserts that there is a "geographical pattern" (Brief, p. 15) with respect to the theatre holdings of the various defendants. This, if it means anything, implies that there is some underlying agreement to which the defendants are parties which parcels out the country and assigns to each a particular sphere. Though plaintiff, in its petition, did allege such an agreement, it presented no evidence on the trial in support of such an allegation. And, of course, the court below did not find that any such agreement or pattern existed.

Despite the plaintiff's unequivocal language in asserting the existence of such a "pattern," we find that the only evidence to which it refers are its compilations with respect to the actual location of the defendants' theatres. This proves nothing. The fact that the theatres in which Twentieth Century-Fox

is interested are mostly located west of the Mississippi River comes about by no conspiracy. It simply reflects the fact that when Twentieth Century-Fox entered into the theatre business twenty years ago it purchased theretofore existing circuits of theatres which were located in the western states (R. 1971, 2001-2003, 2041-2042, 2078, 2103-2104).

Moreover, the existence of any pattern, in so far as Twentieth Century-Fox is concerned, is quickly disproved by a glance at the largest cities in which it has theatres. In Los Angeles, Paramount, RKO and Warner are in competition with it. In San Francisco, RKO and Paramount compete with the Fox theatres. In Kansas City, Missouri, Loew's, Paramount and RKO compete. In Denver, Loew's and RKO are in competition. In Milwaukee, Warner has competing theatres. In addition, Twentieth Century-Fox has a single first-run theatre in New York, Philadelphia and Detroit. In each of these cities these theatres are in first-run competition with theatres of other defendants. We submit that this is hardly the sort of evidence to sustain the claim that there is an implied agreement among the defendants not to compete with each other in the theatre field.

As other examples of the plaintiff's loose treatment of the facts in this respect, we also point out that its statement that there are no towns in Michigan in which two or more major defendants separately operate theatres (Brief, p. 16), is not only wrong, but is shown to be so on plaintiff's own schedule which appears on page 228 of the appendix to its brief. As there shown, Fox, Paramount and RKO operate theatres in Detroit. Plaintiff's statement that prior to the dissolution of pools in San Francisco there was no theatre competition between any defendants (Brief, p. 17) is also incorrect and shown to be so by plaintiff's own compilations, appearing on page

212 of the appendix to its brief. It is there indicated that Fox and RKO separately competed in San Francisco. Plaintiff's list of towns of less than 100,000 population, which it says names the only ones in which the defendants compete with each other (p. 16) is inaccurate in that it omits Huntington Park, San Bernardino, Beverly Hills and San Pedro, California.

2. Plaintiff says:

"Each of the five major defendants as an exhibitor has been licensed by all of the other defendants as distributors at the fixed admission prices." (Brief, p. 24)

This statement seems to us to be misleading and to suggest conclusions which are not in accord with the facts. The language implies that each defendant distributor licenses its product to each theatre of a theatre-owning defendant to the exclusion of independents. The record shows that this is not the case. In 72 of the 92 cities with populations of more than 100,000, one or more defendants, other than Twentieth Century-Fox, have theatres. Yet, in 23 of these 72 cities, Twentieth Century-Fox product is not licensed to the theatre of any defendant, but is licensed to independent exhibitors (Exs. F-12, F-21, F-30).

Similarly, with respect to the theatres in which Twentieth Century-Fox is interested, the facts show that there is no "pattern" pursuant to which they receive licenses to the product of other distributors. We have analyzed this aspect of the distribution of product on pages 15 to 20 of our appellants' brief. The facts show that in a great many instances the product of one or more of these defendants is not licensed to the Fox theatres.

The foregoing facts completely disprove the implication contained in the above quoted sentence. They also disprove

similar statements, such as: "At the same time, they have protected the theatres of the five major defendants from the competition of independents" (Brief, p. 107), which appear at various places in plaintiff's argument.

3. Plaintiff states:

"This conspiracy has been effectuated mainly by means of film licensing agreements between all eight defendants as distributors and the five major defendants as exhibitors" (Brief, p. 24).

It cites, in support of this statement, Finding 64 (R. 3670) which certainly does not support it. That finding contains nothing which indicates that the court below found that any activities of the theatre-owning defendants, as exhibitors, had "effectuated" any conspiracy.

FOURTH: THERE IS NO JUSTIFICATION FOR AN INJUNCTION PROHIBITING A PRODUCER-EXHIBITOR FROM LICENSING ITS PICTURES TO THE THEATRES OF ANOTHER PRODUCER-EXHIBITOR.

Plaintiff strongly presses for an injunction prohibiting any theatre in which Twentieth Century-Fox is interested from licensing for exhibition the product of any other theatre-owning distributor. Conversely, it would also prohibit Twentieth Century-Fox from licensing its pictures for exhibition in any theatre owned by another defendant. This is what the plaintiff refers to as a ban on "cross-licensing."

Here, again, the plaintiff has coined a phrase in an effort to attach some opprobrium to normal and necessary business transactions in this industry. Because cross-licensing in the patent field has been the subject of attack for some years, plain-

tiff has used those words here. But the use of the term is patently inappropriate and inaccurate. There is nothing resembling a "pool of patents" as is so often found in the typical cross-licensing case. For example, there is no agreement between copyright owners restricting licenses to the parties to the cross-licensing agreement.

The unique suggestion by the plaintiff that normal business transactions between defendants be enjoined, was injected into this case after the trial and after the court had handed down its opinion. No such issue was raised by the plaintiff in its pleadings or in the presentation of its case. No evidence was introduced directed to such an issue. It was only after the court below had denied the plaintiff's plea for divorcement, that this suggestion was advanced.

Plaintiff has presented its arguments here as though it considers this relief as something of an incidental, technical nature which should complement the injunctions which the court below has issued against the trade practices which it condemned. Yet such is not the case. Plaintiff fully understands that at most only two or three of the theatres in which Twentieth Century-Fox is interested can be operated with the product distributed by Fox alone, and that in many situations the product of Fox and the other non-theatre-owning defendants is not enough. It knows that with respect to the great majority of the Fox theatres, the product of some of the other theatre-owning distributors is necessary for their effective operation. It knows that the ban it seeks would make it impossible for Twentieth Century-Fox to continue the operation of many of its theatres.

Therefore, this suggestion is simply divorcement under another name. Under this severe handicap Twentieth Century-Fox could not stay in the theatre business. It would

be forced to divest itself of its theatres. This becomes self-evident when consideration is given to the situation of a typical town in this country where the theatres operated by National use 104, 156, 208 or 312 pictures a year. Those theatres could not operate under the restraints proposed by plaintiff. Competing theatres would be able to license the product of the other distributors without competition. The net effect would be to subsidize every independent competitor of National and assure such competitor of pictures of four of the leading distributors in the industry on a non-competitive basis. Plainly, the removal of National from the competitive field, would lessen, rather than enhance, competition. This is certainly not consonant with the spirit or purpose of the Sherman Act.

But the impact of such an injunction would not be confined to the theatre business. Twentieth Century-Fox as a distributor would find arbitrarily closed to it the theatres of other defendants located in many communities in which it has no theatres. Twentieth Century-Fox pictures could not be exhibited in many of the best theatres in the country. Moreover, in the smaller communities where some of these defendants have the only theatres, it would mean that Twentieth Century-Fox pictures could not be exhibited at all. And, paradoxically, with the existing prohibition against expansion which the plaintiff argues should be retained, Twentieth Century-Fox never could exhibit its product in those communities.

Plaintiff fully appreciates the disastrous consequences which would flow from the injunction which it seeks. Its counsel admitted this when he first proposed such a remedy in the court below:

"I am merely suggesting that as an alternative remedy [alternative to divorcement]. I do not think myself that

it is as adequate a remedy of dissolution. But I point it out as simply another means of attempting to accomplish the same result; . . . (R. 2570).

Thus, upon analysis, it is apparent that such an injunction would be solely in the nature of a penalty. It is not required to terminate any of the trade practices which the court below found illegal. This Court should reject it.

FIFTH: NO QUESTION OF "PUBLIC INTEREST" IS INVOLVED.

In what reads as the peroration to its brief (pp. 119-126), the plaintiff comments on what it terms the "public interest" in this case. This is sheer window-dressing.

As plaintiff well knows, this case was never instituted or tried on the theory that the general public interest was involved. On the contrary, this case was prosecuted as a "class action," in the sense that the plaintiff has claimed that restraints in the industry operated to the detriment of that class in which consisted of independent theatre owners.

No evidence was introduced by the plaintiff—and there is none in the record—that the motion picture-going public has been injured in any way by the trade practices which the court below condemned. There is no evidence that the public has been the victim of inflationary prices, or that it has been gouged at the box office, or that any different system would reduce prices. On the contrary, such evidence as there is in the record with respect to admission prices shows that there has been no noticeable increase. The absence of enhanced prices, which are the usual consequence of monopoly, demonstrates

that there has been no monopolization or restraint of competition. This is forcefully demonstrated by an exhibit introduced by the Warner defendants (Ex. W-10, R. 1816-1817). This exhibit contained a comparison of the average admission prices charged by Warner theatres in the year 1931 and the year 1945. The computation was arrived at by dividing the gross box office receipts in each year, exclusive of admission taxes, by the number of theatre patrons in each year. This showed that the average theatre admission price in 1945 was only 1.9% higher than it was in 1931. The foregoing statistics—and they are the only ones in the record with respect to theatre admission prices—thus not only disprove any claim that advantage has been taken of the public, but strikingly show that if cost to the public is to be considered, the current method of distributing and exhibiting motion picture films has been greatly in the public interest.

There is also specific evidence that the public has received the best in theatre accommodations, service and facilities. There is the finding of the court below, amply sustained by the evidence, that every potential motion picture patron has the opportunity of seeing every worthwhile film at a price which meets his individual pocketbook.

The plaintiff also seeks to color its argument by quoting expressions, lifted without relevance, from pronouncements of this Court in cases involving freedom of speech and freedom of the press. It implies that the quality of motion picture production and the scope of subject matter is limited and deficient. It says:

"Certainly such a past gives little hope that they [the defendants] will in the future encourage production of the wide variety of films needed to satisfy the wide variety of tastes possessed by the potential American

film audience, rather than a standardized mass product adapted to profitable exhibition in a controlled market." (Brief, p. 124)

We ask, "What basis exists in this record for such a statement?" Who has said that today's motion picture production is stereotyped and standardized? Who has testified that the tastes of the American film audience, however wide in variety, are not adequately satisfied? Where is there any evidence that any control exercised by these defendants has limited either the subject matter or number of motion picture productions?

Not only is this arrogance on the part of the plaintiff without foundation, but the court below has found to the contrary. It has found that there are no restraints in the production of motion pictures; that a free opportunity exists for anyone to make a picture on any subject and for any purpose and, more than that, there are no restraints which prevent the producer of such a picture from securing proper distribution and exhibition thereof.

This controversy, which is essentially one between competing elements in this industry, cannot be magnified into a "public cause." The only issues here tendered, and the only ones which this Court should pass upon, concern a decree to remove any restraints in trade adversely affecting those who wish to engage in the motion picture business.

Conclusion

It is respectfully submitted that paragraphs (5) and (6) of Section III of the decree should be deleted, that Section V, relating to arbitration, should be modified in the particular above requested and that, in all other respects, the judgment below should be affirmed.

Respectfully submitted,

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